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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been officially reported, and is printed as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Federal Communications Commission violate section 307(b) of the Communications Act, as construed and applied by this Court in the cases of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, when it removed the only VHF television channel assigned to Springfield, Illinois, and assigned it instead to St. Louis, Missouri, which already had four VHF channels?

2. May the Federal Communications Commission validly substitute a concept of "competitive equality" among television channel allocations in selected communities in place of the statutory requirement of section 307(b) of the Communications Act that broadcast frequencies shall be so distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution" of service to each of them?

STATUTE INVOLVED

This case involves section 307(b) of the Communications Act,[1] which reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission *shall make* such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (Emphasis added.)

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[1] Act of June 19, 1934, c. 652, § 307(b), 48 STAT. 1084, as amended by Act of June 5, 1936, c. 5, § 2, 49 STAT. 1475, 47 U.S.C. § 307(b).

STATEMENT OF THE CASE

This case involves the validity of an order of the Federal Communications Commission adopted on February 26, 1957. The order amended section 3.606 of the Commission's Rules and Regulations in such a manner as to make VHF television channel 2 no longer available for use in Springfield, Illinois, and assigned it instead for use in St. Louis, Missouri. Two UHF channels (26 and 36) were substituted for VHF channel 2 in Springfield. The United States Court of Appeals for the District of Columbia Circuit affirmed this action on May 1, 1958.

Unlike its practice (and that of its predecessor, the Federal Radio Commission) in the AM or standard radio broadcasting field, the Commission has dealt with television allocation problems by the exercise of its rule making function rather than by adjudication. In other words, instead of permitting an applicant to apply for any television channel which may be feasible in a given area, the Commission has assigned specific channels to specific communities through the exercise of its rule making powers. Application may only be made for a channel which has been so allocated, with the selection of the best applicant for such a channel subsequently being determined by adjudicatory process pursuant to section 309(b) of the Communications Act, 47 U.S.C. § 309(b).

Through the year 1948, television broadcasting, although used commercially, was still in an experimental or developmental stage. Many engineering facts concerning coverage and interference matters were unknown, and no attempt had been made to establish a comprehensive and detailed nationwide allocation plan.

Confronted with this situation and an ever-increasing demand for the use of frequencies for television broadcasting, the Commission, on September 29, 1948, imposed a "freeze" on all further construction of new television broadcast stations.[2] This freeze was continued in effect until 1952. On April 14th of that year the Commission released its so-called "Sixth Report and Order," in which a detailed and comprehensive nationwide television allocation plan was promulgated.[3]

As pertinent here, the Commission's Sixth Report and Order did two basic things. First, it reassigned certain of the VHF channels which were then in use and provided for the future use of VHF channels at specified locations in accordance with fixed mileage and frequency separations. It also, for the first time, authorized the commercial use of UHF channels. These similarly were assigned to specific communities in accordance with a schedule of mileage and frequency separations. While at that time the advantages of VHF over UHF had not been demonstrated in actual operation to the point which is true today, it was then well known that certain advantages did exist in the VHF band as regards coverage, economies of operation, and potential receiver audience.

The very high frequency (VHF) television band includes VHF channels numbered 2 through 13. The ultra high frequency (UHF) band includes channels numbered 14 through 83. However, the VHF and UHF television bands are not adjacent in the frequency spectrum. VHF channels are found between 54 and 216 megacycles, while the UHF range is from

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[2] 13 FED. REG. 5182 (1948); *see* 1 PIKE & FISCHER RADIO REG. 91:535, 91:536 (1951).

[3] 1 PIKE & FISCHER RADIO REG. 91:601—1112.

470 to 890 megacycles. Thus a large gap of 254 megacycles exists between the highest VHF channel (13) and the lowest UHF channel (14). This gap causes significant engineering differences between the two types of frequencies. Experience since the 1952 allocation has conclusively demonstrated the superiority of VHF over UHF channels to the point where UHF assignments are virtually no longer sought by applicants before the Commission; where scores of previously existing UHF stations have abandoned operation; and where even the national networks, which sought to encourage UHF by their ownership and use of such stations, have been compelled to recognize their unsuitability for present use.

Simply stated, VHF permits a better coverage of a much larger area at a lower cost than UHF. Further, every set sold in the United States is capable of receiving VHF signals; only a very small percentage are equipped to receive UHF signals.[4] Of the 533 pres-

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[4] The present chairman of the Commission stated in 1956 that:

> "A VHF service presently is superior to a UHF. In comparison with UHF, a VHF signal has a wider coverage and less shadow area. Both in operation and reception, VHF is less costly. To ignore these differences in the present stage of the development of broadcasting is to disregard the specialized knowledge of this Commission and the experience of the industry and the public." 13 PIKE & FISCHER RADIO REG. 1571, 1594 (1956) (in a dissenting opinion, on a subject not treated by the majority).

Similarly, on page 106 of the *23d Annual Report of the Federal Communications Commission to Congress* (1957), the Commission attributed the lack of a truly competitive nationwide television service to:

> "... the overwhelmingly large number of VHF-only receivers being manufactured and used, the disparity in performance between UHF and VHF transmitting equipment up to the present time, and the preference of program and revenue sources for VHF over UHF outlets."

ently existing television stations, 445 are VHF stations and only 88 are UHF staitons.[5] This is true despite the fact that there are roughly 2½ times as many UHF channels allocated throughout the country as VHF channels.[6] VHF channels in desirable areas have been and are in great demand, while UHF channels have been and are available virtually anywhere simply for the asking. The difference between them was stated succinctly in a recent opinion of the United States Court of Appeals for the District of Columbia Circuit, where VHF channels were labelled as "superior" and UHF channels as "inferior."[7]

When the Commission adopted the basic television allocation structure in its Sixth Report, it specifically concluded that it "shou'd disperse both VHF and UHF widely among states and communities."[8] The "intermixture" of both VHF and UHF channels in certain communities thus was a basic principle of the Sixth Report; the assignment of *only* VHF channels or *only* UHF channels to particular communities ("deintermixture") was specifically rejected as contrary to the public interest. Further, since VHF channels can cover considerably larger areas than UHF channels,

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[5] *Television Digest*, Addenda 26-x to 1958 *Television Factbook*, July 12, 1958.

[6] There are 1519 UHF channels allocated throughout the nation, 171 of which are reserved for non-commercial educational use; only 619 VHF channels have been allocated, with 76 of them designated as educational. See 1958 *Television Factbook*, pp. 396-402, listing allocations as established by section 3.606 of the FCC Rules and Regulations, 1 PIKE & FISCHER RADIO REG. 53:602—620b.

[7] *WIRL Television Co.* v. *United States*, 253 F.2d 863, 866 (D. C. Cir. 1958).

[8] 1 PIKE & FISCHER RADIO REG. at 91:663.

making it desirable to put VHF channels where there are broad areas of common interest, "the 12 VHF channels were distributed as broadly as possible."[9]

Illinois is the nation's fourth most populous state. Its 1950 census population was 8,712,176, with an average of 158.8 persons per square mile. The population of Missouri was only 3,954,653, with only 57.1 persons per square mile. Despite these population differences, the Commission's Sixth Report and Order assigned Missouri 17 VHF channels and Illinois only 11. Springfield, the capital of Illinois, was assigned one VHF channel[10] (2) and one commercial UHF channel (20).[11] St. Louis, Missouri, was assigned four VHF channels, with channel 9 being reserved for an educational station, and channels 4, 5, and 11 available for commercial use. UHF channels 30, 36, and 42 were also assigned to St. Louis.[12] The following chart re-

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[9] *Id.* at 91:621.

[10] Petitioner Sangamon Valley Television Corporation had been an applicant for a VHF channel in Springfield prior to the Sixth Report and Order, and amended its application thereafter to specify channel 2. Application for this same facility subsequently was made by respondent WMAY-TV Incorporated, resulting in an extended comparative hearing which was not concluded until June 27, 1956. (11 PIKE & FISCHER RADIO REG. 783.) An appeal involving the right to operate on channel 2 in Springfield is now pending in the United States Court of Appeals for the District of Columbia Circuit (Case No. 13,991). However, since channel 2 was removed from Springfield by the action here involved, that appeal is in a postponed status pending this Court's disposition of the instant petition for writ of certiorari.

[11] Pars. 514 and 546 of Sixth Report and Order, 1 PIKE & FISCHER RADIO REG. at 91:806-807 and 91:821.

[12] Pars. 521(d) and 524 of Sixth Report and Order, 1 PIKE & FISCHER RADIO REG. at 91:810 and 91:814.

flects the relevant facts as regards populations, channel allocations, applicants, and permittees immediately prior to the removal of channel 2 from Springfield to St. Louis:

	Illinois	Missouri
Population:	8,712,176	3,954,653
Population per sq. mile:	158.8	57.1
No. of VHF Channels:	10	17
	Springfield	St. Louis
Population:	81,628	856,796

Television channels:

VHF channel 2, applied for by petitioner Sangamon Valley Television Corporation and respondent WMAY-TV Incorporated.

UHF channel 20, on which respondent Plains Television Corporation has operated WICS (TV) since September 1953.

UHF channel 66, reserved for educational use, unclaimed.

VHF channel 4, on which KWK-TV had been operated since July, 1954.

VHF channel 5, on which KSD-TV had been operated since February, 1947.

VHF channel 9, on which educational station KETC had been operated since September, 1954.

VHF channel 11, which was then involved in a four-party comparative hearing; is now in use.

UHF channel 30, use of which has been granted to Plaza Radio & TV Co.

UHF channel 36, on which respondent Signal Hill Telecasting Corporation had operated station KTVI(TV) since April, 1955.

UHF channel 42, use of which has been granted to Wistenn, Inc.

On March 30, 1955, respondent Plains Television Corporation, which was operating a UHF station in Springfield, filed a petition with the Commission requesting the institution of a rule making proceeding to move channel 2 from Springfield to St. Louis. On November 10, 1955, the Commission denied that petition and others of a similar vein on the ground that "it would be neither appropriate nor feasible to approach the problem on the basis of separate, individual petitions designed to alleviate conditions in an individual community or a limited area, through departure from the present structure of channel assignments."[13]

On that same day (November 10, 1955), the Commission instituted another rule making proceeding to consider nationwide television allocation problems.[14] That proceeding culminated in the adoption of the Second Report on Deintermixture on June 25, 1956. In it, the Commission concluded that deintermixture (making the channels allocated to a given area either all VHF or all UHF) was not sufficiently practicable in enough communities to offer any help to UHF on a nationwide basis.[15] But, in direct contradiction of its earlier conclusion, the Commission decided that "interim steps" should be taken in certain selected communities throughout the country with a new goal of improving "the opportunities for effective competition among a greater number of stations."[16]

The instant case thus was born. The Commission issued its notice of proposed rule making on that date

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[13] 13 PIKE & FISCHER RADIO REG. 1522, 1525 (1955).

[14] 20 FED. REG. 8501 (1955).

[15] 13 PIKE & FISCHER RADIO REG. 1571, 1576 (1956).

[16] *Id.* at 1581.

(June 25, 1956), proposing to move VHF channel 2 from Springfield to St. Louis, and add UHF channel 39 as a substitute in the Illinois capital. (J.A. 1-2, R. 1-2.) Subsequently, the Commission modified the proposal somewhat to include adding UHF channel 26 to Springfield (J.A. 3-4, R. 4-5), and to add UHF channel 36 to Springfield instead of UHF channel 39.[17] (J.A. 30-32, R. 97-98.)

On February 26, 1957, the Commission by a 4 to 2 vote adopted the action of which review is here sought. It so amended section 3.606 of its Rules and Regulations as to move channel 2 from Springfield to St. Louis, where it was given to respondent Signal Hill Telecasting Corporation, and assigned instead two additional UHF channels to the Illinois capital. (J.A. 183-209, R. 679-695.) Springfield thus was deprived of its only VHF television channel so that St. Louis could have its fifth; Missouri was given its 18th VHF channel, leaving Illinois with but ten. For the first time in the history of television, the only VHF chan-

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[17] The Commission never proposed to put channel 2 in Terre Haute, Indiana, as well as in St. Louis. Two months after the proceeding began, the Springfield UHF operator (respondent Plains) filed a petition to amend the notice of proposed rule making to consider adding channel 2 to Terre Haute also (J.A. 21-26, R. 25-30). (If channel 2 were removed from Springfield and added to St. Louis, it could also fit into Terre Haute.) The Commission denied this petition on November 1, 1956, but considered Plains' request as a counter proposal. (J.A. 33-34, R. 109.) Terre Haute was almost entirely ignored by the parties in their pleadings. Ultimately, the Commission did add channel 2 to Terre Haute in its action, giving that Indiana city of only 64,214 its second VHF assignment. However, channel 2's assignment to Terre Haute was little more than a footnote to the entire proceeding, and was purely incidental to the move of channel 2 from Springfield to St. Louis.

nel assigned to one major city was taken away and given to a UHF operator in another city in another state, to foster the competitive positions of two existing stations. In explanation of this action, the Commission stated that "the deletion of channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations"—a test or standard which appears nowhere in the Communications Act. (J.A. 199, R. 689.)

In its decision the Commission made no reference whatsoever to the populations of the states of Illinois and Missouri, nor to the number of VHF channels previously assigned to them. It made no reference to the population of Springfield. It made no finding whatsoever that St. Louis had a greater need for a fifth VHF channel than Springfield had for its first, nor did the Commission make any finding that Missouri needed its 18th VHF allocation, leaving Illinois with but 10. In no way did the Commission explain how its action could satisfy the requirement of section 307(b) that frequencies be allocated in such a way as to result in a fair, efficient, and equitable distribution of broadcast service to each of the several states and communities.

Petitioner Sangamon subsequently filed a petition for rehearing based upon section 307(b). (J.A. 210-19, R. 719-26.) It was denied (along with other petitions for rehearing) on June 20, 1957, again by a 4 to 2 vote of the Commission. (J.A. 240-56, R. 1103-12.)

On July 3, 1957, petitioner Sangamon filed a petition for review of such action in the United States Court of Appeals for the District of Columbia Circuit, pursuant to section 402(a) of the Communications

Act,[18] which incorporates by reference the Judicial Review Act of 1950.[19]

The sole question presented by the petition for review, which was briefed and argued by agreement of all of the parties, was: "Did the Federal Communications Commission act contrary to the provisions of section 307(b) of the Communications Act, in the circumstances of this case, when it deleted the only VHF television channel which had been assigned to Springfield, Illinois, and assigned it instead to St. Louis, Missouri, and Terre Haute, Indiana?"

The case was decided by the court of appeals only two weeks after oral argument. The court wrote simply a one paragraph per curiam opinion, in which no reference was made to the requirements of section 307(b) nor was any attempt made to decide that the Commission's action was in compliance with section 307(b). Moreover, the court made no reference to the *Nelson Brothers* and *Allentown* decisions of this Court in which the language of section 307(b) has been construed and applied to basically similar situations.[20]

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[18] Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 63 STAT. 108, as amended, 66 STAT. 718, 47 U.S.C. § 402(a).

[19] Act of December 29, 1950, c. 1189, §§ 1-12, 64 STAT. 1129-32, as amended, 68 STAT. 961, 5 U.S.C. §§ 1031-42.

[20] In fairness, it should be noted that the court of appeals literally has been besieged by appeals from UHF operators which, unlike the respondents here, were unsuccessful in their efforts to stave off competition from superior VHF stations. In each of those cases, the court of appeals affirmed Commission action which held that the right of the public to superior VHF service was paramount to the UHF operators' competitive self-interests, and that UHF operators could not prevent the use of VHF channels in areas to which they long had been assigned. *E.g., Springfield Television*

REASONS FOR ALLOWANCE OF THE WRIT

1. The Commission did not even attempt to apply the mandate of section 307(b) to this case, although the applicability of section 307(b) must, under the decisions of this Court, be determined at the outset of a frequency allocation matter.

2. The action depriving Springfield of its only superior VHF assignment in order to move it to St. Louis, which already had four VHF channels, and giving Missouri its 18th VHF channel at the expense of Illinois which now has only 10, is a clear violation of section 307(b)'s requirement that frequencies be so allocated as to result in a fair, efficient, and equitable distribution of service to each of the several states and communities.

3. The Commission's action was taken in direct contradiction of the *Allentown* and *Nelson Brothers* decisions of this Court, in that the Commission made no findings whatsoever as to the relative needs of the communities and states involved for a frequency which only one could have.

4. The Commission's action was taken solely (and admittedly) to enhance the competitive positions of certain existing UHF station operators, a purpose found nowhere in the Communications Act and con-

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Broadcasting Corp. v. *FCC*, U.S. Ct. of App. for D.C. Cir., Case No. 14,050 (June 19, 1958); *Jacksonville Journal Co. FCC*, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957); *Coastal Bend Television Co.* v. *FCC*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727, *cert. denied*, 352 U.S. 935 (1956). Although a totally different question was presented by this case, the court of appeals may have believed incorrectly that this was another such matter.

trary to this Court's decision in the case of *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940).

This case is the first one in which the Commission has ever deprived a major city of its only superior VHF channel and given it—for purely competitive reasons—to an operator in another city in another state. However, the Commission's action apparently presages a whole new course of conduct, without regard to the specific limitation on Commission discretion which was established by Congress in enacting section 307(b). On the same day that the Commission acted in this case, it removed the only superior VHF channel from Peoria, Illinois, moving it to Davenport-Rock Island-Moline, Illinois, to protect existing UHF stations in Peoria.[21] (The channel was not given to anyone in Moline; there are now eight applicants for it.) The Commission also removed the only VHF channel from Evansville, Indiana,[22] and Fresno, California[23]—again solely to help the competitive positions of UHF station operators in those areas.[24]

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[21] 22 F.C.C. 342 (1957). The deintermixture of Peoria was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *WIRL Television Co.* v. *United States, supra* note 7. The court's opinion in that case did not refer to section 307(b) at all. It is understood that a petition for writ of certiorari will be filed in that case.

[22] 22 F.C.C. 382 (1957).

[23] 22 F.C.C. 365 (1957).

[24] Stations are still on the air on the sole VHF channels which were allocated to Evansville and Fresno. Since the channels were in use when the Commission decided to remove them, show cause proceedings were necessary under section 316 of the Communications Act, 47 U.S.C. § 316, before the operating authorizations of the licensees could be changed. Those proceedings are now pending.

Today there are some 274 intermixed communities in the United States—communities to which both VHF and UHF channels have been assigned.[25] Petitioner is informed that at this very time the Commission is actively considering deintermixture in over 20 more cities in the United States, with competitive factors only being considered and with section 307(b) being disregarded. Moreover, an authoritative trade publication recently reported that:

> "At its June 9, [1958] session, the FCC specifically considered . . . the proposal of Comr. Frederick W. Ford that the FCC move ahead on its selective deintermixture program geared toward making *all* intermixed markets either all vhf or all uhf."[26] (Emphasis added.)

Whether section 307(b) will be read out of the Communications Act as regards television channel allocations in numerous communities throughout the United States, under the Commission's new concept of "competitive equality," depends entirely upon this Court's disposition of this case.

Like any young and dynamic industry, television has many problems. One problem is the sphere of network-station relationships. Dean Roscoe L. Barrow of the University of Cincinnati Law School headed a special staff which recently completed an extensive network study. While that study took some two years to

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[25] 1958 *Television Factbook*, pp. 388-395, listing allocations as established by section 3.606 of the FCC Rules and Regulations, 1 PIKE & FISCHER RADIO REG. 53:602-620b.

[26] *Broadcasting*, June 23, 1958, p. 56.

complete and resulted in a 737 page report,[27] nonetheless Dean Barrow recently stated: "Unquestionably, the greatest problem in broadcasting is that of [television channel] allocations."[28]

That problem continues, and will continue. It is unquestioned that where VHF stations and UHF stations compete in the same area, UHF stations suffer competitive disadvantages. This is a normal, proper, and continuing by-product of VHF's superiority, just as excellence in any field enjoys a competitive advantage over comparative inferiority. It may well be that an answer should be found to encourage the development of UHF stations—but whatever answer is found cannot be violative of the Communications Act. As long as VHF channels are available, and as long as they are allocated throughout the nation, they must be allocated fairly and equitably among the several states and communities. Section 307(b) is mandatory; it unequivocally provides that the Commission *shall make* such a distribution of frequencies.

Yet today the Commission is on the threshold of removing superior VHF channels from many other communities, without regard for the requirements of section 307(b) and solely for the purpose of equalizing competition. The illegality of this has been lucidly expressed by no less than the present Chairman of the FCC. It was in 1956 that the Commission adopted its Second Report on Deintermixture, culminating a general rule making proceeding on allocation problems. In it, the Commission decided to consider deintermixture in certain communities—including Springfield. *Despite its length, however, the Report contains no reference whatsoever to the effect or applicability of*

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[27] H. R. REP. No. 1297, 85th Cong., 2d Sess. (1958).

[28] *Television Digest*, July 12, 1958, p. 6.

section 307(b) on the deintermixture of a community. The majority's total disregard of the statutory mandate compelled the present Chairman of the FCC to dissent. In pertinent part he stated:

> "The Federal Communications Act provides that the distribution of frequencies among the several states and communities shall be upon a fair, efficient and equitable basis. *It makes no provision for a 'nation-wide competitive system.'* Admittedly ample competition, *if attainable without doing violence to the equitable and efficient provisions of the Act,* would be in the public interest. But when this is to be accomplished at the expense of denying a first television service to substantial numbers of people, it is *tantamount to displacing the Congressional mandate of an efficient and equitable distribution and substituting therefor equal competitive facilities for a few applicants.*
>
> *"To assign only UHF frequencies to some communities when a VHF service is available, is in my opinion, inequitable.* A VHF service presently is superior to a UHF. * * * To ignore these differences in the present stage of the development of broadcasting is to disregard the specialized knowledge of this Commission and the experience of the industry and the public."[29] (Emphasis added.)

The importance of the question involved here—whether the Commission can and will ignore section 307(b) and substitute therefor an allocation standard not set forth in the Act—is further evidenced by Congressional interest in the problem. On May 26, 1958, Stephen J. Angland, an attorney for the current Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of

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[29] 13 PIKE & FISCHER RADIO REG. 1571, 1594 (1956); see also note 4, *supra.*

Representatives, testified before the Subcommittee. The following colloquy occurred between Mr. Angland and Congressman Peter F. Mack, Jr., with regard to this very case:

> Mr. Mack: "The very purpose of our investigation is to see if laws have been repealed by the independent agencies, to see whether they are abiding by the law as passed by Congress, or whether they are establishing their own rules notwithstanding the laws passed by Congress. You remember that in the Federal Communications law that the Congress expressed a desire to have equitable consideration in all areas and that it was the intent of Congress not to discriminate against any state, any individual, any municipality, or any group of individuals, is that correct?"
>
> Mr. Angland: "Yes, sir."
>
> Mr. Mack: "As a matter of fact, are they not discriminating against the people in this particular area where they have deintermixed? Are they not discriminating against these people by giving them inferior service in this area?"
>
> Mr. Angland: "I think so. This [Springfield] is the capital of one of our large states. It is an important city."
>
> Mr. Mack: "I inquired about this matter the other day. I think it is alarming and *as yet* it has only affected one state and one area within that state, but I am very concerned about the situation there and I believe that this committee should make a thorough investigation and, in my opinion, they should reconsider the channel 2 allocation on this basis alone."
>
> * * *
>
> Mr. Mack: "The deintermixture question is the important one as far as I am concerned, because I believe that *that is probably the first instance where we have run across a gross violation of the*

basic law by the Federal Communications Commission."[30] (Emphasis added.)

This Court twice before has examined the language of section 307(b). Both of its decisions have been squarely contradicted by the Commission action of which review is here sought.

The first case was that of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933), which stressed the paramount importance of the requirement of section 307(b).[31] In that case, a party in Gary, Indiana applied for a radio frequency which was then being shared by two stations in Chicago, Illinois. Comparing the populations of the two states and the amount of broadcast services which had been allocated to the respective cities and states, it was apparent that Indiana had less than its fair and equitable share of frequencies, while Illinois had more. Accordingly, the Commission granted the application, taking the frequency away from the two existing stations and putting it in Gary where there was a greater need for it.

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[30] Pages 623-625 of the Transcript of the Hearings of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, May 26, 1958 (not yet officially printed).

[31] The *Nelson Brothers* case was decided while the Davis Amendment (since repealed) to section 9 of the Radio Act (45 STAT. 373) was in force. Nonetheless, the case is squarely in point. The unique feature of the Davis Amendment was that the United States was divided into five zones for allocation purposes, with a fair and equitable allocation of service being required within each zone. Since the two cities and states involved in the *Nelson Brothers* case were in the same zone, the statute created the same standard as the present section 307(b) establishes on a nationwide basis.

This Court upheld the Commission's action, unanimously reversing the court of appeals. Said the Court (289 U.S. at 283):

> "The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between States as well."

This Court interpreted section 307(b) more recently in the case of *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In that case, which closely parallels this one factually, applicants from the respective cities of Easton and Allentown in Pennsylvania each sought a frequency which only one could have. Easton had only one existing station, while Allentown had three. Although Allentown was several times larger than Easton, it was ruled that Easton's need for a second local outlet was greater than Allentown's need for a fourth station. This Court held that when applicants from different communities seek the same frequency, *the first and paramount question which the Commission must answer is: Which community has the greater need for the service? Only after that section 307(b) question has been answered* can the Commission consider the relative merits of the applicants.[32]

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[32] See also *Courier Post Publishing Co.* v. *FCC*, 70 U.S. App. D.C. 80, 104 F.2d 213 (1939). The Commission had acted in the Easton-Allentown situation though adjudication, while the action of which review is here sought was taken through rule making. However, this distinction has no bearing on the legal question presented. The Commission, of course, "may allocate channels among communities either by passing upon specific applications or by way of rule making," *Logansport Broadcasting Corp.* v.

The holding of the *Allentown* case acquires even greater significance here, for channel 2 was moved not only from one community to another, but from one state to another.

In this case the Commission made no findings whatsoever as to whether Springfield or St. Louis, or Illinois or Missouri, had the greater need for channel 2. Moreover, it made no findings as to the populations of the two states or of Springfield, and it made no findings as to the number of VHF channels assigned to the two states. The "fair and equitable" distribution of service required by section 307(b) could only have been satisfied by leaving channel 2 in Springfield. Yet the Commission deprived the Illinois capital of its only wide-coverage VHF channel to give St. Louis its fifth; it gave Missouri—with less than half the population of Illinois—its 18th VHF channel, leaving Illinois with only 10. A more glaring violation of section 307(b) could scarcely be imagined.

As the rationale of its decision, the Commission concluded simply that "the deletion of Channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations." (J.A. 199, R. 689.) However, the Communications Act contains no language whatsoever which would indicate any Congressional intent that there be "competitive equality" among stations in a given area.

When Congress enacted the Communications Act, it easily could have decreed that all broadcast stations in

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United States, 93 U.S. App. D.C. 342, 345, 210 F.2d 24, 27 (1954), and the mandate of section 307(b) applies with equal force regardless of the method pursued.

a given community must be "competitively equal." It chose not to; to the contrary, as this Court stressed in the *Sanders* case, ". . . the Act recognizes that the field of broadcasting is one of free competition."[33] Further:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[34]

In fact, the language of section 307(b) expressly negatives any concept of "competitive equality," for it requires that service be distributed fairly, efficiently, and equitably *among* the several states and communities, rather than *within* them. Consider the standard broadcast (AM radio) band. No one has ever contended that there must be competitive equality within any community. In Washington, D. C., for example, the radio stations range from WOL's 250 watts to WTOP's 50,000 watts. Washington thus has a fair and equitable share of superior radio services as well as of poorer ones, with each fulfilling a different community need.

Clearly section 307(b) requires a fair and equitable distribution of superior frequencies as well as of inferior ones. As long as the superior VHF channels are assigned throughout the country, they *must* be assigned fairly and equitably in compliance with section 307(b). The Commission cannot validly assign

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[33] *FCC* v. *Sanders Brothers Radio Station, supra,* 309 U.S. at 474.

[34] *Id.* at 475.

them fairly and equitably everywhere in the country except in Springfield and Peoria and certain other selected cities, and assign only UHF channels to those communities so that UHF stations in them need not have to compete against a superior VHF station. It must be borne in mind that the public interest is paramount in the administration of the Communications Act; section 307(b) exists for the specific purpose of ensuring that the public of each community and state receives its fair and equitable share of service. The rights of the public of Springfield and Illinois to their fair shares of superior VHF service cannot validly be subordinated to the competitive interests of a few UHF station operators.

CONCLUSION

In its *Allentown* decision, *supra,* this Court observed that: "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece."[35] The instant case presents a classic example of this concept. Springfield is the centrally located capital of the nation's fourth most populous state. It is the center of a vast political, economic, and cultural area of broad common interests. In urgently requesting that this Court review this case, we close by quoting from a pleading filed with the Commission in this proceeding by the State of Illinois, through its Attorney General:

> "[P]resent UHF frequencies are entirely inadequate to telecast news, events, programs, interviews and other activities emanating from the city of Springfield, due to the location there of the State Government, the Court and the Illinois State Fair, to the number of Illinois residents that Chan-

[35] 349 U.S. at 362.

nel 2, with its VHF range, could reach; nor will the allocation of additional UHF frequencies to Springfield remedy the situation.

"Accordingly, it is submitted that the allocation of VHF Channel 2 to Springfield, Illinois, is a fair, equitable and necessary assignment of that channel, and the public interest of the people of the state in the activities and events of the city of Springfield, due to the fact of the seat of the government, courts and Illinois State Fair there, require that such broadcast by television should be extended to as many of the people of the state as possible; and *it would appear patently unreasonable and inequitable to allocate another VHF channel from the city of Springfield to the city of St. Louis to the loss and detriment of the people of Illinois within VHF range of the city of Springfield.*" (J.A. 167-68, R. 638-39; emphasis added.)

WHEREFORE, since the Commission's action in moving VHF channel 2 from Springfield to St. Louis was violative of section 307(b) of the Communications Act, and further was in contravention of the decisions of this Court in the *Nelson Brothers, Allentown,* and *Sanders* cases, *supra,* it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

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July 30, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13992

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., WMAY-TV, INC.,

SIGNAL HILL TELECASTING CORPORATION,

PLAINS TELEVISION CORPORATION,
Intervenors

Petition for Review of a Decision and Order of the Federal Communications Commission

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Decided May 1, 1958

Mr. Stanley S. Harris, with whom *Messrs. D. M. Patrick* and *Lester Cohen* were on the brief, for petitioner.

Mr. John J. O'Malley, Jr., Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *Richard A. Solomon,* Assistant General Counsel, Federal Communications Commission, and *Daniel M. Friedman,* Attorney, Department of Justice, were on the brief, for respondents.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.,* was on the briefs, submitted on the briefs for intervenors American Broadcasting-Paramount Theatres, Inc., and Plains Television Corporation.

Mr. Stanley S. Neustadt, with whom *Messrs. Marcus Cohn* and *Paul Dobin* were on the brief, submitted on the brief for intervenor WMAY-TV, Inc.

Messrs. Monroe Oppenheimer, William P. Bernton and *James H. Heller* were on the brief for intervenor Signal Hill Telecasting Corporation. *Abraham J. Harris* also entered an appearance for intervenor Signal Hill Telecasting Corporation.

Before EDGERTON, *Chief Judge,* and FAHY and BASTIAN, *Circuit Judges.*

PER CURIAM: Petitioner seeks review of a rule-making decision of the Federal Communications Commission resulting in amendment of the Table of Television Channel Assignment. The amendment assigned VHF Channel 2, Springfield, Illinois, to St. Louis, Missouri, and Terre Haute, Indiana, accompanied with the assignment of UHF Channels 26 and 36 to Springfield.

Petitioner, applicant for Channel 2 at Springfield, attacks the decision as illegal because inconsistent with section 307(b) of the Communications Act.[1]

We are unable to sustain this attack. Upon the basis of a full hearing the Commission weighed the various factors involved and reached a reasoned decision within its competence. We find nothing, arbitrary, capricious or otherwise illegal in the decision, and it accordingly is

Affirmed.

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[1] This section reads as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(b) (1952).